

JUDGE CROTTY

13 CIV 3595 (PAC)

David E. McCraw
Stephen N. Gikow
Legal Department
The New York Times Company
620 8th Avenue – 18th Floor
New York, NY 10018
phone: (212) 556-4031
fax: (212) 556-1009
mccraw@nytimes.com
Counsel for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



THE NEW YORK TIMES COMPANY,

Plaintiff,

- against -

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

COMPLAINT

ECF CASE

Plaintiff The New York Times Company ("The Times"), by its undersigned attorneys,
alleges for its Complaint:

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), 28 U.S.C. § 2201 and § 2202, the United States Constitution, and federal common law seeking the production of agency records improperly withheld by Defendant United States Department of Justice ("DOJ") in response to requests properly made by The Times.

2. The Executive Office for Immigration Review (“EOIR”) is a component of Defendant United States Department of Justice (“DOJ”).

3. By its failure to determine The Times’s request within the time set by FOIA, DOJ, through EOIR, has denied Plaintiff access to the transcripts and complete record of removal proceedings conducted by Immigration Judge James Grim (the “Documents”) adjudicating the removal of General Carlos Eugenio Vides Casanova, a former El Salvadorian official who was implicated in human right violations.

4. The evidentiary proceedings were conducted in public, and Judge Grim’s two decisions directing the removal of General Vides have been made public, with only minor redactions.

5. The withholding of the Documents violates FOIA and is contrary to The Times’s rights of access under the First Amendment and common law.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

7. Because DOJ has failed to determine The Times’s request for the Documents in the time set by FOIA, Plaintiff is deemed to have exhausted all administrative remedies and is now entitled to appeal directly to the Court to enforce the dictates of FOIA pursuant to 5 U.S.C. § 552(a)(4)(B).

8. Venue is premised on the place of business of The Times and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

9. Plaintiff The New York Times Company operates The New York Times newspaper. The New York Times Company is headquartered in this judicial district at 620 Eighth Avenue, New York, N.Y.

10. Defendant DOJ is an agency of the federal government that has possession and control of the records that Plaintiff seeks.

FACTS

The Immigration Court System

11. DOJ, through EOIR, oversees the entire United States immigration court system. As such, it is responsible for deciding whether individuals charged with violating United States immigration laws should be removed from the United States, or whether those individuals should be afforded some form of relief or protected status and allowed to remain within the country. In overseeing this vast system, DOJ relies on over 260 immigration judges in 59 immigration courts across the country.

12. In Fiscal Year 2012 alone, more than 400,000 immigration-related matters were received in the immigration court system, and some 380,000 matters were completed during that same period. Of the matters received, more than 300,000 were immigration court proceedings – which include some matters related to the exclusion, removal, and/or relief from removal of aliens. The rest of the proceedings were bond redetermination hearings or motions to reopen and reconsider a previously heard matter.

13. In an immigration court removal proceeding, the respondent-alien first appears before an immigration judge and either contests or admits the charges against him or her.

This process usually occurs at a master calendar hearing. If the charges are contested or the respondent represents that he or she may request relief from removal, the judge is empowered to grant an adjournment to allow the respondent to prepare for a full evidentiary immigration court hearing

14. Once the judge holds a removal hearing regarding either the removability of the respondent or his or her requests for relief from removal, the judge renders a decision. At this stage, the judge may find the respondent removable on the charged grounds.

15. Thereafter, the Immigration and Nationality Act (the "INA") provides for a wide-range of forms of relief from removal, such as granting the respondent asylum, or ordering adjustment of status. If the respondent is not subject to removal as charged, then the immigration judge may terminate the proceedings.

16. In the course of the proceedings, the parties may move the court for certain types of relief, including a change of venue, a change of counsel, a stay of removal, or the issuance of a subpoena. Immigration judges decide these motions either by written decision or orally at a hearing.

17. Immigration hearings are presumptively open to the public and may be closed only in certain limited situations set forth in the Immigration Court Practice Manual.

18. Out of the total number of completed court proceedings in FY 2012, approximately 187,000 were completed when the judge issued a decision in the case. Some 70 percent of those cases resulted in an order of removal; roughly 13 percent were terminated; and around 16 percent resulted in the grant of some form of relief.

The Removal Proceedings of General Vides

19. Carlos Eugenio Vides Casanova was El Salvador's Director of the National Guard, one of the three security forces under military control, from October 1979 to April 1983. He was then elevated to the position of Minister of Defense, in which role he served from 1983 to 1989.

20. General Vides has been accused of "ordering, inciting, assisting or otherwise participating" in the commission of acts of torture and extra-judicial killing during those time periods, pursuant to INA § 237(a)(4)(D).

21. General Vides has been accused, among other things, of assisting or otherwise participating in the killing of a group of four American churchwomen and the assassinations of two American labor advisors.

22. Upon retiring in 1989, General Vides immigrated to the United States as a legal permanent resident. At the time of immigration, General Vides had close family members residing in the United States. General Vides had visited the United States and met with U.S. officials frequently during his tenure.

23. Since his immigration to the United States, two civil cases have been brought against General Vides for human rights violations, including assassination and torture. In 2002, a Florida jury found General Vides and General Jose Guillermo Garcia, another former Minister of Defense for El Salvador, civilly liable for the torture of three Salvadorans. In the other case in 2000, a jury did not find either General Vides or General Garcia liable for the deaths of the four American churchwomen.

24. On or about October 2, 2009, removal proceedings were initiated against General Vides.

25. Immigration Judge Grim issued a written decision of more than 150 pages on February 22, 2012 (the “February Decision”) determining that General Vides was subject to removal from the United States under INA § 237(a)(4)(D) because he had “committed, ordered, incited, assisted or otherwise participated” in certain human rights violations, to wit, torture or extra-judicial killing.

26. The Immigration Judge’s decision was an exhaustive examination of the testimonial and documentary evidence that had been presented in a public proceeding.

27. The Department of Homeland Security presented the testimony of two torture survivors, one former U.S. Ambassador to El Salvador, and one El Salvador academic expert and submitted thousands of pages of documents; the respondent presented the testimony of one former U.S. Ambassador to El Salvador and one former Deputy Chief of Mission for the U.S. Embassy and also testified on his own behalf.

28. As part of the removal proceedings against General Vides, Immigration Judge Grim issued a second decision on August 16, 2012 (the “August Decision”) concerning General Vides’s requests for relief from removal.

29. In the August Decision, Immigration Judge Grim denied all of General Vides’s requests for relief from removal.

30. In opening the removal proceedings on April 18, 2011, Immigration Judge Grim made a ruling from the bench that the hearing would be open to the public.

31. As a result, members of the public attended the hearing, which lasted seven days.

32. The public was able to hear the parties present arguments and to witness extensive testimonial and documentary evidence on the subject of General Vides's conduct in El Salvador and the legal basis for his removability.

33. The record evidence as well as the testimony presented provided the critical support relied upon by the judge in making his decisions, and both testimony and documents are cited directly throughout the decisions.

34. DOJ initially took the position that the February Decision and August Decision were confidential documents that could not be released under FOIA.

35. In April of 2103, The Times and its reporter Julia Preston sued for the release of the February Decision and the August Decision in an action captioned *New York Times v. U.S. Department of Justice*, 13 civ. 2179 (RJS) (S.D.N.Y.).

36. As a result of that litigation, DOJ released the February Decision and August Decision, with only minor redactions.

The Times's Request

37. On April 17, 2013, The Times submitted a FOIA request to DOJ through EOIR (the "Request") seeking (a) all transcripts of the removal proceedings relating to General Vides and (b) the complete record of the removal proceedings, including copies of motions, decisions, and orders.

38. By a letter dated April 18, 2013, DOJ acknowledged receipt of the Request.

39. By a letter dated April 30, 2013, DOJ denied The Times expedited treatment.

40. Under FOIA, DOJ was required to make a determination of the Request within 20 business days of the submission of the request, and the time period for a response passed on May 16, 2013.

41. No response was received from DOJ as of May 16, 2013.

42. By a letter dated April 17, 2013 (the “First Amendment and Common Law Request”), The Times asked the Executive Office of Immigration Review to release the Documents under the First Amendment and federal common law.

43. DOJ has not responded to the First Amendment and Common Law Request.

The Public’s and The Times’s Interest in Disclosure

44. The public has a general interest in knowing how DOJ administers the immigration court system. The United States has a rich history of openness and access to adjudicatory proceedings. Such transparency ensures that the individual’s and society’s interests are being adequately represented and ensures the legitimacy of all adjudicative systems.

45. The immigration court system adjudicates the rights of hundreds of thousands of individuals each year. Although hearings are generally open to the public, many aspects of the immigration court process are withheld from public view – including, as here, materials like the Documents, which provide the public insight into how cases are determined.

46. The public has a particular interest in monitoring General Vides’s case given his history of participating in torture, extra-judicial killing, and other human rights violations, especially in light of his long-term stay in the United States despite the accusations of human rights violations.

47. The public's understanding of how the government handles such cases and its confidence in the system are enhanced by being able to inspect the evidence in a case such as this one.

48. Further, the public has a particular interest in monitoring whether Judge Grim appropriately analyzed the competing arguments and evaluated the evidence in a proceeding that was highly unusual for an immigration court in its length, type and number of witnesses, and number of submitted documents.

49. Finally, the public has a particular interest in those materials within the Documents that shed light on the activities of former U.S. officials and implicate the credibility of the former U.S. officials.

50. Judge Grim's decisions repeatedly address the role of former U.S. officials, as presented in the evidence and the testimony.

51. Without access to the Documents, the public is unable to fully assess whether DOJ performed its duties lawfully and adequately. In particular, it is impossible to tell how well DOJ made its case for removal; how well the judge balanced the various arguments made at the public hearings; and whether the judge properly applied the law to the facts of General Vides's case.

FIRST CAUSE OF ACTION

52. Plaintiff repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

53. DOJ is an agency subject to FOIA, 5 U.S.C. § 552(f), and must therefore release in response to a FOIA request any records in its possession at the time of the request not

subject to an exemption and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

54. DOJ has asserted no lawful basis under FOIA for withholding the Documents.

55. DOJ has failed to grant or deny the Request within the time specified in 5 U.S.C. § 552(a)(6)(B).

56. DOJ's failure to provide this information violates FOIA generally, and specifically 5 U.S.C. § 552(a)(3).

57. Plaintiff is entitled to an order compelling DOJ to produce the Documents.

SECOND CAUSE OF ACTION

58. Plaintiff repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

59. DOJ is an agency subject to the Constitution of the United States and the First Amendment, as well as federal common law.

60. Under both the First Amendment and the common law, Plaintiff, as well as the public at large, has a right of access to the record of adjudicatory proceedings, including the transcripts of the proceedings, whether those proceedings are conducted by the judiciary or by an administrative agency wielding quasi-judiciary power.

61. DOJ's failure to provide the Documents violates the First Amendment and is contrary to the rights of the Plaintiff under federal common law.

62. Plaintiff is entitled to an order declaring that the Documents are public under the First Amendment of the Constitution and that Plaintiff have a right to copy and inspect the documents.

63. Plaintiff is entitled to an order declaring that the Documents are public under federal common law and that Plaintiff have a right to copy and inspect the documents.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- a. Declare that the withheld Documents are public under 5 U.S.C. § 552 and the First Amendment and common law rights of access;
- b. Order DOJ to provide those records to Plaintiff within 20 business days of the Court's order;
- c. Award Plaintiff the costs of this proceeding, including reasonable attorney's fees, as expressly permitted by FOIA; and
- d. Grant Plaintiff such other and further relief as this Court deems just and proper.

Dated: New York, New York
May 28, 2013



David E. McCraw
Stephen N. Gikow
Legal Department
The New York Times Company
620 8th Avenue - 18th Floor
New York, NY 10018
phone: (212) 556-4031
fax: (212) 556-1009
e-mail: mccraw@nytimes.com
Counsel for Plaintiff